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and Decisions

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(TD–78–330)

Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York.

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 78–237 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Japan yen:	
September 11, 1978	$0.005211
September 12, 1978	.005222
September 13, 1978	.005266
September 14, 1978	.005259
September 15, 1978	.005267
Ireland pound:	
September 15, 1978	$1.9615
Spain peseta:	
September 11, 1978	$0.013412
September 12, 1978	.013472
September 13, 1978	.013468
September 14, 1978	.013468
September 15, 1978	.013530
Switzerland franc:	
September 11, 1978	$0.616713
September 12, 1978	.617475
September 13, 1978	.626566
September 14, 1978	.626174
September 15, 1978	.627353

United Kingdom pound:
September 15, 1978 ---------- $1.9615

LIQ-3-O:D:S

Date: September 21, 1978.

BEN L. IRVING,
Acting Director,
Duty Assessment Division.

(T.D. 78-331)

Foreign Currencies—Daily Rates for Countries not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the date and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

Peoples Republic of China yuan:
September 11–15, 1978 ---------- $0.588097

Hong Kong dollar:
September 11, 1978 ---------- $0.2111
September 12, 1978 ---------- .2107
September 13, 1978 ---------- .2105
September 14, 1978 ---------- .2105
September 15, 1978 ---------- .2100½

Iran rial:
September 11–15, 1978 ---------- $0.0141½

Philippines peso:
September 11–15, 1978 ---------- $0.1373

Singapore dollar:
September 11, 1978 ---------- $0.4439
September 12, 1978 ---------- .4442
September 13, 1978 ---------- .4455
September 14, 1978 ---------- .4440
September 15, 1978 ---------- .4442

Thailand baht (tical):
September 11–15, 1978 ..... $0. 0505

(LIQ–3–O:D:S)

Date: September 21, 1978.

BEN L. IRVIN,
Acting Director,
Duty Assessment Division.

(T.D. 78–332 through T.D. 343)

Customs Service Decisions

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest of importance to warrant publication in the CUSTOMS BULLETIN.

Dated: September 27, 1978.

LEONARD LEHMAN
Assistant Commissioner,
Regulations and Rulings.

(T.D. 78–332)

Valuation of Assists

Date: August 4, 1976
File: R:CV:V
540739 IS

To: District Director of Customs, Nogales, Ariz. 85621.

From: Director, Classification and Value Division.

Subject: Request for internal advice No. 69/75; profits on assists under cost of production and constructed value appraisements.

This is in reference to a request for internal advice submitted by (name) Esq., dated March 26, 1975, in which he requested a ruling with respect to the application of a profit percentage to the value of U.S. assists in connection with an 807.00 assembly operation.

You assert that in C.I.E. 21/72, headquarters correctly decided that profit is not required on the cost or value of U.S. materials, unless the usual practice of assemblers in the country of exportation is to charge and receive profit on the cost or value of their customers' materials. You assert that the same test should control the question of profit on assists.

We agree with the analogy you have drawn. Profit should not be computed on the value of assists unless it is determined that it is usual for assemblers of merchandise of the same general class or kind in the country of exportation to charge such profit. However, as a per unit value for the assists must be included in the assembler's general expenses or costs of fabrication under cost of production, the amounts for the assist must also be included in determining the statutory minimums for general expenses and profit under cost of production.

This ruling is being circulated to all Customs officers to insure uniformity of appraisement.

(T.D. 78–333)

Valuation; Constructed Value; Interest Expense; Items 806.30 and 807.00, TSUS

Date: October 5, 1976
File: R:CV:V

DEAR——: This refers to your letter of April 16, 1974, on behalf of (the importer), in which you ask whether interest expense is regarded as a dutiable element of constructed value within the meaning of section 402(d), Tariff Act of 1930, as amended, in the valuation of merchandise under the provisions of items 806.30 and 807.00, Tariff Schedules of the United States (TSUS).

Under item 807.00, TSUS, duty is assessed on the full appraised value of the merchandise, less the value of the U.S. components, while under item 806.30, TSUS, duty is assessed on the cost or value of the processing abroad.

Accordingly, under item 806.30 it is not necessary to appraise the processed merchandise, but only to determine the cost or value of the processing abroad. However, when the appraising officer concludes that the cost or value of the processing as set out in the invoice and entry papers is not reasonable, he must determine the cost or value of the processing in accordance with sections 402 or 402a.

You advise that one of the importer's established overseas subsidiaries engaged in substantial borrowing activities in order to obtain funds to establish additional subsidiaries in other locations overseas, and that the interest expense generated by this borrowing resulted solely from making loans to other foreign subsidiaries. You submit that this interest expense is unrelated to the assembly or processing of merchandise for importation into the United States and, therefore, that it is not an element of value upon which duty is to be paid on importation of the merchandise.

Customs has previously ruled that interest expense incurred to raise capital used in an assembly operation is dutiable as a general expense. On the other hand, where an assembler incurs an expense unrelated to the assembly of articles to be imported into the United States, that expense is not a part of the dutiable value of the imported merchandise. Accordingly, the full costs of borrowing money, including expenses such as finder's fees, as well as related interest expense incurred by an assembler on money borrowed by that assembler and used to establish an assembly operation in a different country are not a part of the dutiable value of the articles assembled by the borrower. This would be equally true of articles processed under item 806.30, TSUS.

However, both under item 806.30, TSUS, and item 807.00, TSUS, to the extent that a new subsidiary which receives the principal of a loan from a sister subsidiary may pay less than the full costs of borrowing to its sister subsidiary, the difference between the costs paid by the sister subsidiary and the costs paid by the new subsidiary to the sister subsidiary must be included in the general expenses of the new subsidiary for Customs purposes. We assume that, in keeping with generally accepted accounting principles, these costs would be reflected on the books of the new subsidiary.

This decision is applicable equally to merchandise valued under section 402a, Tariff Act of 1930, as amended, and to transactions between unrelated parties.

This decision is being circulated to all Customs officers in order to achieve uniformity of appraisement.

(T.D. 78–334)

Valuation; Constructed Value; Idle Facilities

Date: March 7, 1977
File: R:CV:V
541204 JAS

DEAR——: This is in response to your letter of July 20, 1976, in which you request that Customs reconsider and clarify the treatment given to the costs of idle facilities for constructed value purposes.

You indicate that your client (name), imports semiconductor devices from subsidiaries in various foreign countries, including Hong Kong, Korea, Singapore, and Mexico, under items 806.30 and 807.00, Tariff Schedules of the United States (TSUS), which have traditionally been appraised under constructed value, section 402(d), Tariff Act of 1930, as amended. You indicate further that the sub-

sidiaries have at times encountered a variety of "extraordinary cost" situations including several involving idly facilities. To illustrate your point, you cite the case of (name's) plant which for several years operated at near full capacity, but, because of an unanticipated business turndown, suffered a dramatic curtailment of production. As a reslut, over 40 percent of the plant (12,000 ft^2) became idle. The unused space has been blocked off by a temproary wall, the machinery and utilities in that section have been shut down, and no work performed. Under these circumstances. you take the position that costs associated with disproportionate unused facilities and equipment are clearly outside the ordinary course of business and are thus nondutiable.

Specifically, you request clarification of the apparent disparity between ORR ruling 73/0092, dated April 6, 1973, wherein we stated in part that "a disproportionate amount of unused space would generally not be in the ordinary course of trade," and our ruling of May 18, 1976, file R:CV:V IS 540673/540063, wherein we stated in part "we do not believe that ORR ruling 73/0092 should be extended to cover the situation where an assembler discontinues use of floorspace which was previously used in the assembly operation. Where an assembler has acquired the floorspace for use in his assembly operation, and has used that floorspace in the assembly operation, the costs associated with that floorspace are properly a part of the general expenses of the assembly operation, and if the space should subsequently cease to be utilized, those costs, nevertheless, continue to be general expenses of the assembly operation. We believe the same result should obtain where the assembler discontinues use of machinery or equipment which has been used in the assembly operation."

It is uncontroverted that general expenses under constructed value are those "usually" incurred by assemblers of the same general class or kind of merchandise. Likewise, at the start of an assembly operation it is reasonable to assume that the assembler will set aside a portion of floorspace and equipment for future assembly operations of the same kind, in anticipation of expanding his operation. In ORR ruling 73/0092, we concluded that the costs associated with this unused floorspace and equipment, if not disproportionately large as compared to the total available floorspace and equipment, would be of a type "usually" incurred by assemblers of the same general class or kind of merchandise. We further concluded, on the other hand, that expenses associated with floorspace and equipment reserved at the start of an assembly operation for a future, different assembly

operation would not be part of the usual general expenses for the merchandise being assembled.

Upon further consideration, we recognize the difficulty in establishing that unused floorspace and equipment are reserved for a future, different assembly operation, as opposed to an expansion of the same assembly operation, and are now of the opinion that the better rule with regard to the costs of unused floorspace and equipment is, that regardless of the intended use of the floorspace and equipment, those costs associated with the unused floorspace and equipment would not be dutiable if the floorspace and equipment are not used in a current assembly operation. However, once the floorspace and equipment are used in the same or a different assembly operation, the costs of heretofore unused floorspace and equipment would properly become a part of the expenses of the asssembly operation in which they are used.

The question would then be whether our ruling of May 13, 1976, can be interpreted to cover a situation of the type (name) facing at its Korean plant, among others; that is, do the costs of floorspace and equipment once used in an assembly operation, but temporarily idled because of a cutback in production occasioned by an economic turndown, continue to be expenses of the assembly operation? We are of the opinion that the cited ruling is to be so interpreted.

In our opinion, recessions or economic downturns by their very nature are temporary, and, therefore, a normal incident to any business activity. To stress the severity of an economic downturn, we feel, is to ignore its true character as a cyclical phenomenon, which is generally to be anticipated by an ongoing business. That you recognize the cyclical nature of an economic downturn might reasonably be inferred from the statement on page 3 on your July 20, letter, "Insofar as production was concerned, that portion of the plant did not exist for the period during which the plant and equipment were not used." From this statement it is apparent that the idled space and equipment will not be diverted to other revenue-producing activities; rather, they will remain segregated until the economic climate is such that they can again be used in the assembly operation.

We might distinguish a situation such as yours from one in which expenses are incurred by reason of force majeure, that is, by an unanticipated or supervening occurrence such as a fire, or the situation where a business fails completely and terminates operations. We have held in the past that expenses incurred in such situations were not to be deemed usual general expenses in a constructed value appraisement.

274-189—78——2

Accordingly, ORR ruling 73/0092 and our ruling of May 18, 1976, are hereby modified insofar as they are inconsistent with this ruling.

This ruling is being circulated to all Customs officers to insure uniformity of appraisement.

(T.D. 78-335)

Valuation; Cost or Value of Processing; Item 806.30, TSUS

Date: July 28, 1977
File: R:CV:V
540841 SPK

DEAR——: This is in reference to your letter of September 3, 1975, wherein you requested information concerning the importation of articles manufactured in Mexico. Your letter does not specify the nature of the merchandise being imported, but you do state that the merchandise qualifies for importation under item 806.30, Tariff Schedules of the United States (TSUS). Furthermore, you do not specify any of the facts or circumstances involved in the transactions. However, your inquiry raises specific questions as to whether the following costs would be considered part of the cost or value of processing abroad. These costs are as follows:

(1) Mexican sales tax.
(2) Infrequent overtime costs.
(3) Severance pay.
(4) Mexican income tax.

You also request general information concerning the method of determining cost or value of processing abroad under the provision of item 806.30, TSUS.

The cost or value of processing abroad is determined as follows. Duty is assessed only on the cost or value of the processing abroad for articles entitled to the benefit of item 806.30, TSUS. This amount is the amount set out in the invoice and entry papers, unless the appraising officer concludes that the amount set out does not represent a reasonable cost or value. In order to determine whether the amount set out in the invoice and entry papers is reasonable, the appraising officer may request detailed cost information from the importer, and may require such verification of data submitted as he deems necessary, including an audit of the importer's and/or processor's books. The appraising officer may require additional cost information from time to time as he considers necessary. In determining whether the amount set out in the invoice and entry papers is reasonable, or, when he

concludes that such amount is not reasonable, the appraising officer will determine the cost or value of the processing in accordance with the principles set out in section 402 or 402a, Tariff Act of 1930, as amended, as specified by headnote 2(a), subpart B, part 1, schedule B, TSUS.

As noted above, your inquiry is of a general nature and does not particularize the facts and circumstances of the importations. Accordingly, our comments with respect to the methods of determining the cost or value of the processing abroad are necessarily general and of an advisory nature.

Your initial question concerns the dutiable status of the Mexican sales tax, impuesto mercantil. You state that this tax is currently 4 percent and is applied on all articles manufactured in Mexico. However, you offer no description as to how this system of taxation operates. Accordingly, we are not in a position to offer definitive statements concerning the dutiable status of this "sales tax." We would add though, when such a determination is made, the issue of dutiability will depend on several factors. These factors include (1) which basis of valuation will be utilized under the old value law or the new value law, (2) the level of distribution at which the tax is applicable (i.e., wholesale or retail level), and (3) whether or not the tax is refunded on exportation. These items are not inclusive, but are merely offered for the purpose of indicating the type of factors the appraising officer will look to. As an example, we would note that a "sales tax" payable on all merchandise that is manufactured in Mexico and not refunded upon exportation would be dutiable if the method of valuation was export value, section 402(b), Tariff Act of 1930, as amended. This tax would constitute part of the price at which such or similar merchandise is freely sold for exportation to the United States. However, if the method of valuation was constructed value, section 402(d), it is the position of the Customs Service that in such instances the "sales tax" would not constitute part of the constructed value of the merchandise. In these latter instances the tax attaches subsequent to placing the merchandise in a condition ready for shipment to the United States. We note that our analysis assumes that the "sales tax" accrues on the final sale of the finished product. Our comments do not apply to those instances where a sales tax is paid on materials used in producing the final product. The tax in these instances would constitute part of the cost of materials, section 402(d)(1). Thus, any determination as to whether the Mexican sales tax on the finished product would form part of the cost of processing under item 806.30, TSUS, depends upon the circumstances of that transaction.

Next you request our comments concerning the dutiability of "infrequent overtime costs." The position of the Customs Service concerning whether overtime costs are properly included in the computation of cost of production (sec. 402a(f)) or constructed value (sec. 402(d)) can be summarized as follows. Overtime costs incurred in the ordinary course of manufacturing or assembling the merchandise are included as labor costs in cost of production and constructed value appraisements. Only those overtime costs attributable to temporary circumstances of an extraordinary nature are not included in these appraisements. It is our opinion that overtime costs attributable to "rush orders" would not be caused by such extraordinary circumstances as to warrant holding these costs not dutiable. As to other instances that necessitate the assembler to incur overtime costs you merely describe these situations as "unusual circumstances." We would note that the dutiability of overtime costs in these situations would be be decided in accordance with the above stated principle.

Your third question requests our comments concerning whether severance pay would be part of the cost of processing abroad. This question, as with overtime costs, will arise in cost of production and constructed value appraisements. The position of the Customs Service is well settled concerning the dutiability of severance pay when items 806.30 and 807.00. TSUS, are involved and employees are released as the result of a recession or slowdown. In a recent headquarters ruling, internal advice response No. 24/75, we ruled that severance pay occasioned by an economic recession or slowdown is dutiable as a normal incident of doing business. The internal advice involved the importation of electric circuits and related items from Mexico under items 806.30 and 807.00, TSUS. Thus, the full cost incurred by an assembler of paying a released employee severance pay will be considered a usual general expense in a cost of production or constructed value appraisement. Accordingly, it will be part of the dutiable value of processing the article when these methods of appraisement are utilized.

At this point we would note the distinction in the statutory language under both value laws between the "cost of materials" and "usual general expenses." For an item to be found dutiable as part of the cost of materials that cost must attach "at a time preceding the date of exportation." However, when determining an amount for general expenses we are seeking a figure that represents the general expenses that are usually reflected in the sale of merchandise of the "same general class or kind as the merchandise undergoing appraisement" (sec. 402(d)(2)). This distinction does not, however, require that all

expenses of doing business are to be dutiable as "usual general expenses."

The significance of this distinction has been that certain expenses, (i.e., taxes on material which are actually paid, but subsequently refunded upon exportation), will remain properly part of the cost of production appraisements, section 402a(f)(1), or where applicable constructed value appraisement, section 402(d)(1). See *Schweppes (U.S.A.), Ltd.* v. *United States*, 43 Cust. Ct. 608, A.R.D. 111 (1959) and *Swizzels, Inc.* v. *United States*, 38 Cust. Ct. 644, R.D. 8794 (1957). In sum, the statute has not been interpreted to include every expense of doing business, as a "usual general expense" under cost of production or constructed value appraisements.

Your final question requests our comments concerning the "income tax" assessed by the Mexican federal government or profit. Your letter does not detail the mechanics of this "income tax." However, based on our own inquiries to the Mexican Embassy, it appears that this tax is similar to the U.S. corporate income tax. Thus, the issue presented for our review, is whether the expense of paying an income tax is dutiable. After reviewing the law in this area we have found no precedent in either the court cases or administrative rulings that directly discuss the dutiability of income taxes. However, our analysis of this issue leads us to the concusion that income taxes are dutiable as a function of profit. The position of the Customs Service can be summarized as follows: The term "profit" mentioned in section 402a(f)(4) and section 402(d)(2) refers to gross profit as opposed to net profit, and gross profit is the profit realized by a manufacturer before the payment of income taxes.

"Black's Law Dictionary," 4th edition (1968) defines income tax as a "tax on the yearly profits." Thus by definition the income tax a company pays is determined by the profit it makes. It is this profit figure, a figure determined before the payment of income taxes that is to be included in cost of production and constructed valuve appraisements.

Our position is further supported by Customs precedent, case law, and a review of past Tariff Acts of the United States. CIE letter 792/58 outlines the procedures that appraising officers are to use in determining an amount for general expenses and profit under constructed value of the then new value law (sec. 402(d)(2)). This letter unequivocally refers to the profit figure as "gross profit." Furthermore, CIE letter 1532/59 also refers to the term profit as gross profit. This ruling letter discussed the relationship between section 402(d)(2) and section 402(g)(1) and the letter describes profit as "the producer's gross profit."

Accordingly, when appraising officers determine the proper amount to be included in constructed value, that profit figure is taken without consideration of subsequent income tax consequences. The profit figure will thus include whatever income tax liability a manufacturer may later incur. Accordingly, when a profit figure is given for Customs purposes, it is to be without regard to possible later income tax consequences.

The definition we have given the term profit is further supported by case law. One of the leading Customs Court cases discussing the dutiability of general expenses and profit defines the term profit as the difference between expenses and receipts. *United States* v. *Alfred Dunhill of London, Inc.*, 32 CCPA 187, 189, C.A.D. 405 (1932). The *Dunhill* case listed the following expenses as the usual dutiable general expenses of business: Cost and manipulation of materials, all salaries, wages and commissions, traveling expenses, advertising, rents, taxes on buildings, stationery, stenographic, telephone and telegraph expenses, costs of delivery, depreciation on plant and equipment, and other actual outlays are dutiable general expenses. Noticeably, income tax was not included as a dutiable general expense of business. Furthermore, the court then defined profit as the difference between these expenses and cash receipts. Thus, for Customs purposes, this figure represents dutiable profit. Accordingly, whatever income tax may be levied against profit on this merchandise occurs subsequent to establishing a dutiable value for the merchandise.

In addition, we note that income tax statutes first appeared after the cost of production statute was passed. For example, it was not until 1916 in the United States, 1921 in Mexico, and 1917 in Canada, that these respective countries adopted any form of federal income tax. Thus, prior to these particular dates a profit figure could not be expressed as both before or after taxes. Nevertheless, the Tariff Act of 1930, and its subsequent amendments, continued to embrace the term profit in the same manner as it had been done in the prior statutes. Since at the time of the earlier statutes there was no tax on profit, it seems clear that the act meant to duty what we now define as a gross profit figure. Subsequent changes in the Tariff Act left the term profit in the same form as it previously appeared. Accordingly, despite the adoption of income tax statutes, the term "profit" appears in the same form in the Tariff Act. Since Congress has elected to leave the term "profit" in the form it previously appeared, we are of the opinion that we are to treat the term "profit" in the same manner as we have historically.

At this point we would note that our analysis of this issue applies with equal force to the term "profit" as it appears in both the old

value law, section 402a(f) and the new value law, section 402(d). In comparing cost of production in the old value law and constructed value in the new value law, we note that a principal difference between the two valuation methods is the elimination in the latter of arbitrary additions of minimum amounts for general expenses (10 percent) and profit (6 percent). This distinction becomes relevant in light of our analysis of income taxes. It would be improper to consider income taxes as part of the 10-percent general expense factor, since whatever income taxes a manufacturer becomes liable for are not, under this analysis, a "general expense" of producing the merchandise.

Finally, for your further reference, we are enclosing copies of two recent rulings which we believe provide valuable general information concerning valuation methods under item 806.30, TSUS.

(T.D. 78–336)

Valuation; Effect of Contract Renegotiation Prior to Exportation

Date: August 2, 1977
File: R:CV:V
541496 JAS

To: District Director of Customs, Seattle, Wash. 98174.

From: Director, Classification and Value Division.

Subject: Reconsideration of internal advice No. 383/76.

This is in response to your memorandum dated February 8, 1977, file APP–6–07:D:CV, in which you request reconsideration of the subject internal advice.

Our reply to this internal advice, dated January 18, 1977, stated in part that if the appraising officer has persuasive evidence, in the case of a price which is renegotiated before exportation due to a currency fluctuation, that the new price is not freely offered or does not fairly reflect the market value of the merchandise under appraisement at the time of its exportation to the United States, or if there is insufficient information as to the terms and conditions of the renegotiation, he should use the original purchase price adjusted by the amount of the currency revaluation if it results in a value increase of at least 5 percent. The 5-percent figure, you note, is an administrative factor only and is not a factor in appraisement.

You indicate that appraisement should be based on the seller's invoiced addition to or subtraction from the original price, or similar evidence of the adjusted price agreed upon, as being the best evidence

available of the price at which the seller was willing to sell. Lacking such information, you would utilize the rate of exchange published by the CIE as current on the date of exportation.

At the outset, we presume that the matter was originally certified to headquarters under section 177.11(a) of the Customs Regulations. That section in part authorizes Customs Service field offices to request "[A]dvice or guidance as to the interpretation * * * of the Customs * * * laws with respect to a specific Customs transaction * * *" From a reading of the file, especially your letter of November 13, 1975, file APP–6–04:D:CV, it is apparent that you are seeking clarification of the matter of currency fluctuation in the Far East in general, outside the context of a particular Customs transaction. Section 177.1(a) precludes responses in such cases because of the possibility of applying the ruling to new fact situations, resulting in possible distortions of its original meaning. However, due to the need for a prompt response, we will consider the request for reconsideration under the internal advice procedure.

From your November 13, 1975, letter, it appears that merchandise from most Far East countries is usually bought and sold in the ordinary course of trade in those countries in their respective currencies. It is therefore incumbent upon the appraising officer to arrive at a price in the foreign currency, at which the merchandise is freely sold or, in the absence of sales, offered for sale for exportation to the United States. See section 402(f)(1), Tariff Act of 1930, as amended. However, James Drake, Seattle import specialist, informed James Seal of this office by telephone on June 13, 1977, that the existence of such or similar merchandise in the involved product lines is difficult to establish. He also indicated that the shipments in question are very small, such that information necessary to appraise under constructed value is virtually impossible to obtain on a case-by-case basis.

Therefore, when there has been a contract renegotiation prior to exportation due to a currency fluctuation, the appraising officer will have to determine from the best evidence available whether or not the new purchase price can be used to establish export value under section 402a(d) or section 402(b). He will have to decide if the new price is "freely sold" under the cited law. Absent evidence to the contrary, we believe the officer would be warranted in accepting the properly documented renegotiated contract price to establish export value, as arrived at using all reasonable ways and means, section 500(a), Tariff Act of 1930, as amended. Of course, if subsequent to a contract renegotiation there is evidence of sales or offers to sell such or similar merchandise at the time of exportation to the United States of the merchandise undergoing appraisement, these may be used to

establish an export value. If these differ from the renegotiated price, it may be because the renegotiated price was an individually bargained-for price which has not been regarded by the court as a freely offered price. *F. B. Vandergrift and Co., Inc.* v. *United States*, 56 CCPA 105, C.A.D. 962 (1969).

We must next consider the situation where there is insufficient information as to the terms and conditions of the renegotiation. In such cases, the appraising officer would be compelled, in effect, to conclude that a freely sold price for the merchandise does not exist under sections 402a(d) and 402(b) and proceed to a different basis of appraisement.

In any event, it is our opinion that the original purchase price, adjusted by the certified quarterly rate (sec. 159.34, Customs Regulations), the daily buying rate (sec. 159.35, Customs Regulations), or the CIE rate current on the date of exportation, would not per se represent a freely sold price under sections 402a(d) and 402(b) of the Tariff Act. As you correctly point out, the currency conversion regulations merely aid the conversion of foreign currencies into American dollars and do not serve as a factor in appraisement. CIE 20/73, dated May 22, 1973, CIE 55/73, dated December 7, 1973, and CIE 7/74, dated February 4, 1974, are affirmed insofar as they are consistent with this ruling.

Our January 18, 1977, reply to internal advice 383/76 is hereby superseded.

(T.D. 78–337)

Valuation of Assists

Date: August 19, 1977
File: R:CV:V
400113 SPK

DEAR ——: This is in response to your letter of February 27, 1974, regarding the valuation of assists which are furnished a foreign assembler.

You state the following pertinent facts: The research and development necessary to produce the imported merchandise took place in 1946, that the merchandise was produced domestically for 28 years, and that it is only recently that the merchandise has been assembled abroad. You have supplied us with your best estimates of the research and development costs if they had occurred today, since there are no available records showing the actual research and development costs in 1946. Furthermore, you have informed us that the fruits of (name's)

research and development in 1946 resulted in (name) being granted both a patent and a copyright. The life of the patent being 17 years expired in 1963 when (name) elected not to renew it. However, since the copyright has an effective life of 50 years it is still in force today.

Inasmuch as a portion of the research and development is no longer protected by the patent (name) does not have a legally protected interest in that information. It is our opinion that the furnishing by (name) of that information which was protected by the patent will not be considered a dutiable assist. This information now constitutes knowledge in the public domain. Thus, it is freely available to anyone who would be interested in obtaining it. However, that portion of (name's) research and development that is still protected under copyright law will be considered a dutiable assist when it is furnished by (name) to the assembler. This specific information, since it is still protected by the copyright, does not constitute knowledge in the public domain and thus is not freely available to everyone. Accordingly, when (name) furnishes this information to the assembler, it has furnished a dutiable assist.

Your inquiry specifically asks three questions. When reviewing our following responses bear in mind that they relate only to that portion of the research and development costs attributable to the information still protected by the copyright.

Your questions and our responses are as follows:

1. In the absense of specific data, can estimates be used to establish market value?

It is permissible to ascertain the value of an assist by estimating its market value. It is noted, however, that the actual decision as to the value to be placed on an assist is the responsibility of the appraising officer at the port of entry.

2. Can present costs be reduced to reflect estimated costs incurred originally?

In determining the value of research and development assists, the Customs Service will generally attempt to ascertain the full original cost of the assists. If actual cost figures are unavailable, you may estimate the cost of developing the information. This estimate may be based on wage rates paid at the time the information was originally developed.

3. Can R. & D. costs incurred more than 25 years ago be disregarded? If not, how far must one go back to establish R. & D. costs?

The fact that research and development necessary to produce an imported article may have taken place more than 25 years before importation does not mean that the R. & D. costs can be disregarded in

determining the dutiable value of imported merchandise. Research and development costs necessary to produce imported merchandise should be reflected in the merchandise's appraised value regardless of when the R. & D. costs were incurred.

The actual decision as to the dutiable elements which constitute a basis of appraisement is the responsibility of the appraising officer at the port of entry. Therefore, it is suggested that you consult with the district director at the port where you plan to enter the merchandise in order to arrive at a figure for dutiable research and development assists. In the absense of cost figures, the district director may resort to all reasonable ways and means to determine the value of the assists pursuant to section 500(a) of the Tariff Act of 1930, as amended.

(T.D. 78–338)

Valuation; Costs Incurred by Discontinuation of Product Line

Date: September 28, 1977
File: R:CV:V
541533 JAS

DEAR ——: This is in response to your June 27, 1977, letter in which you request a ruling regarding the dutiability of certain costs associated with the discontinuance of a particular product line currently being phased out by the foreign subsidiary of your client.

Specifically (company A), imports tantallum and aluminum electrolytic capacitors processed in Mexico by (company B), a wholly owned subsidiary of (company A). You indicate that (company B) contains approximately —— square feet of space and has employed up to —— persons at peak levels. The processing space and production employees have been divided throughout the existence of the facility, between the aluminum and tantallum product lines. Characteristics and processing requirements of the two products are totally distinct and incompatible. This division, you indicate, is both physical and financial.

(Company A) has decided to discontinue production of aluminum electrolytic capacitors due both to a reduced demand for them in the United States and to increased competition for the remaining American market. (Company A) expects to terminate the 262 employees in the aluminum capacitor line; 190 of these employees have already been terminated. Personnel employed in the aluminum capacitor line are not trained in the assembly of tantallum capacitors and are not interchangable with personnel in the tantallum line. All equip-

ment associated with the aluminum capacitor line will be returned to the United States. The vacated space will be retained by (company A) for use with a new product line which will commence during the first half of 1978. Within this context, you seek clarification of the duty consequences of termination pay, the cost of removing production equipment, depreciation on equipment after shutdown but prior to removal, the cost of packaging and returning to the United States unused raw materials, and fixed costs allocated to the aluminum electrolytic capacitor line during the period from shutdown to the point the area is totally vacated, including building depreciation, interest expense, utility costs, and administrative expenses. You contend that the costs directly associated with the "proposed" termination of the aluminum electrolytic capacitor group are not "usual" general expenses under section 402(d)(2), Tariff Act of 1930, as amended. In addition, you request that the building depreciation and interest expense allocated to the aluminum electrolytic capacitor line not be made part of the constructed value of the tantallum capacitors. You agree, however, that the remaining fixed administrative expenses will be allocated to that line.

With respect to termination payments already made to —— persons and to be made to the remaining —— persons associated with the aluminum capacitor line, we believe that PRD 74–6, dated February 14, 1974, which you cite, is in part applicable. In holding termination payments to be nondutiable in that case we stated "The obligation to, pay severance pay arose after the merchandise in question was assembled and after the assembler terminated operations." In so deciding we believe our comments in the PRD on whether termination payments are usual or unusual or whether they are the result of the failure of a business are not relevant here. We presume, of course, that the aluminum capacitor line is effectively terminated as of the date the first —— employees were released, and that the remaining —— employees are not continuing in that assembly operation. In this regard, we have held that expenses incurred subsequent to termination, as for example, in windup operations, would not be incurred in the production of imported merchandise and would be nondutiable. This appears to be the case here.

The cost of removing production equipment from the aluminum capacitor line would likewise be nondutiable since it would not be a cost incurred in the production of imported merchandise from that line. Again, we presume that line is effectively terminated as of the date of release of the first 190 employees. If production were to continue beyond that point, the cost of removing some, but not all the

equipment, would constitute a general expense associated with that line.

Depreciation on equipment, while normally considered an element of general expense, would be nondutiable if incurred after shutdown of the aluminum capacitor line, regardless of when the equipment is removed.

The cost of packaging and returning to the United States unused raw materials suitable for use in the aluminum capacitor line would be nondutiable since the cost would be incurred after termination of that line and, as such, would not be incurred in the production of imported merchandise.

Fixed costs, such as building depreciation, interest expense, utility costs, and administrative expenses, allocated to the aluminum capacitor line during the period from shutdown to the point the area is totally vacated would be nondutiable in accordance with the rationale of the preceding paragraph. We presume the proportion that expenses allocable to the aluminum capacitor line bears to the total expenses allocable to that line and the tantallum capacitor line can be proven to the satisfaction of the concerned appraising officer. This appears likely since you have indicated the division between the two product lines to be "both physical and financial." It necessarily follows that upon termination of the aluminum capacitor line none of the residual fixed costs such as building depreciation and interest expense allocable to the —— square feet previously occupied by that line would be made a part of the constructed value of the tantallum capacitor line; however all remaining administrative expenses will be allocated to the tantallum capacitor group.

A copy of this letter is being sent to the district director in Laredo for his guidance with respect to importations at Brownsville.

(T.D. 78–339)

Valuation; Proration of Costs of Designs

Date: October 13, 1977
File: R:CV:V
541462 EA

To: Area Director of Customs New York Seaport, N.Y. 10048.

From: Director, Classification and Value Division.

Subject: Reconsideration of headquarters ruling of February 2, 1977, replying to internal advice request No. 75–128.

This is in response to your memorandum of April 8, 1977, requesting reconsideration of internal advice request No. 75–128 of February 2, 1977. In internal advice 75–128, this office ruled that only the cost of designs which are actually sent abroad and used in the production of the imported merchandise are dutiable. We ruled further that the cost of each design is to be determined by ascertaining the cost of the designer's services, that is the designer's hourly charge multiplied by the number of hours spent on that particular design, plus all other costs, such as the cost of materials, necessary to produce the design.

In your request for reconsideration you take issue with this ruling on the basis of our treatment of the costing concept. It is your contention that the importer pays the designer for his talent and not for piecemeal work. Therefore, you are of the opinion that total designer costs should be prorated over designs actually utilized rather than designs produced.

It is the position of the importer that design costs should be prorated over designs produced, or prorated in a manner consistent with I.A. 75–128. This latter position is asserted in submissions by the law firm representing the importer, and two other law firms representing clients similarly affected by our ruling in I.A. 75–128. (Name) takes the position that only the cost of designs actually used in the making of the imported article form an element of dutiable value. (Name) advances the proposition that research not utilized is normally capitalized in the period the research is abandoned and is not allocated to any completed article. Several sections of the Internal Revenue Code are cited to support this position. Alternatively it is asserted that designs costs may be prorated over exported and domestic prototypes, in the same manner as such costs were prorated over imported prototypes in *Border Brokerage Co., Inc.* v. *United States*, R.D. 11725 (1970). Finally, (Name) asserts that it would be improper to impute the cost of retained designs to the cost of utilized designs, because retained designs are business assets of the importer and could be used at some future date either through sale, or through production in the domestic or foreign market.

In treating this reconsideration, we will attempt to respond to each enumerated argument raised and to cited cases. At the outset, we wish to point out that the difficult questions raised by the request for internal advice and request for reconsideration are not susceptible to blanket determinations, as the question of what is a reasonable method of establishing cost for purposes of valuing an asset must be answered in light of particular fact situations. Therefore, we will respond to the issues raised in this request, in light of the facts as established in the initial request for internal advice.

It appears that the importer deals in children's garments and retains an independent stylist on a retainer basis to produce a few hundred designs each year. The retainer is paid in monthly installments plus as additional sum for each day the designer visits the importer's premises to go over the designs. These designs become the property of the importer. Approximately one-half of the designs produced are chosen by the importer for production abroad. The remainder of the designs are retained by the importer and their use is uncertain; they may ultimately be discarded, or a decision could be made at some later date to use the design in domestic production or production abroad or to sell the design.

Counsel cites numerous cases that stand for the proposition that the costs of designs that are used in the production of the merchandise under consideration are dutiable. *Ravenna Mosaics, Inc.* v. *United States*, 49 Treas. D.C. 699, T.D. 41503 (1926); *Lionel Trading Co.* v. *United States*, 24 CCPA 432, T.D. 48900 (1937); *Ford Motor Co.* v. *United States*, 29 Cust. Ct. 553, A.R.D. 9 (1952); *Troy Textiles Inc.* v. *United States*, 64 Cust. Ct. 654, R.D. 11697 (1970); *Goodrich Gulf Chemicals, Inc.* v. *United States*, 66 Cust. Ct. 509, R.D. 11733 (1971). We do not find these cases to be dispositive of the issue involved in this inquiry. All of these cases dealt with questions of whether particular items were dutiable as assists. In none of the cases cited did the court consider the question of how the assists were to be valued. Counsel phrases the issue as whether the cost of designs not used in the production process are included in dutiable value. We are of the opinion that designs that are not utilized in production do not constitute dutiable items. The issue is instead how we are to determine the value or cost of the designs that actually were utilized in production.

Although the court in *Ravenna Mosaics, supra*, stated that if the plans had been destroyed or discarded, their conclusion would be different, this was neither central to the decision in the case nor of assistance to the issue of partial use of designs. The issue in *Ravenna* was whether the supplied plans were dutiable at all, especially in light of the fact that the furnished plans were not directly used to make the imported article but were instead used to make "shop designs" that were directly utilized in production of the imported article. Were all assists furnished by the importer rejected by the manufacturer, who then sought and obtained his own designs, a substantially different question would be raised about the dutiability of an assist that is offered but in no way utilized. In *Carey S. Skinner Inc.* v. *United States*, 3 Cust. Ct. 600, R.D. 4663 (1939), although the allocation of design costs is noted by the court, there is nothing

in the record to indicate that the propriety of such an allocation was ever challenged by the Government or was ever at issue. As we view this case, it appears likely that the remainder of the design costs were simply allocated to merchandise that was the subject of other importations not in controversy before the court.

In *Border Brokerage Co., Inc.* v. *United States*, R.D. 11725, research and development was furnished to a manufacturer in Canada to produce two prototype telephone devices, such production being both contemplated and contracted for. One prototype was imported into the United States for field testing and the other remained in the laboratory for further testing. The court held that the research costs could be prorated over the two models although only one was imported. Counsel contends, relying on *Border Brokerage*, that if five prototype garments are produced domestically for one design, and one prototype is furnished to an overseas manufacturer as a design assist, then this assist should be valued at one-fifth its cost.

We disagree with counsel's anslysis. In *Border Brokerage*. the court was appraising an imported article and seeking to determine the value of an assist, to be included in this value. In the present matter, we are not seeking to determine the value of domestically produced prototypes, but instead wish to determine the value of an assist furnished to a foreign manufacturer. Of course, once importation of garments that have utilized the assist occurs, we have no objection to the proration of that particular design cost over all such garments produced or contracted for by that exporter, for sale in the United States and all other markets. We do not see, however, how production of prototypes in this country reduces costs that the foreign manufacturer would have had to pay for such designs were they not furnished by the importer.

Upon examining all cases cited by counsel for the various interested importers we are of the opinion that none of these cases are determinative of the issues involved here. Nor are we aware of any other court cases or rulings of the Customs Service that are decisive. The remainder of this ruling will discuss the basis for our decision on the facts before us, and will incorporate responses to the remaining arguments advanced by counsel for the importers.

We are of the opinion that the proration formula as described in I.A. 75–128 is incorrect and is to be modified as follows:

1. At the time of the importation of the first article that employs one of the designs provided in a particular period, the full amount of the designer's fees, paid in the period in which the design is created, shall be prorated among that design and all other designs created in

that period, that are being utilized in a production run, either domestic or foreign, or for which there is a current contract for production. Assume for example, that a designer is paid a $10,000 fee during a period, and produces 100 designs. At the time of the first importation of an article using that design, 30 of the designs are being utilized in domestic production and 20 are being utilized in the foreign market. Under these circumstances proration of the $10,000 fee may be made over the 50 utilized designs. The cost of each design would be $200, or the full $10,000 would be divided over the 50 designs in a manner consistent with a time allotment scheme, and each particular assist could be further prorated in a normal manner over imported articles for the production of which it has been utilized.

2. If other designs created in the same period and covered by the same retainer are subsequently utilized, their value would be determined by a subsequent proration of the entire fee over all designs utilized to that date. For example, if a 51st design was subsequently utilized its value would not be $200, but would be the quotient of $10,000 over 51, or about $196.

We do not take the position that every expense that an importer incurs is in some manner allocable to the assists that it furnishes to a foreign manufacturer. We are of the opinion however, that the value given to an assist must bear a reasonable relation to its cost. Where a designer is paid a set fee regardless of how many designs are produced or accepted for further use, it appears that the importer incurs a lump sum expense in order to procure the designs needed for a particular seasonal inventory of finished goods, and it further appears to be of little consequence how many designs are actually created. Under these circumstances, we do not believe it is proper to treat the cost of each design, whether utilized or not, as the quotient of a professional services fee over the number of designs produced. As you point out in your request for reconsideration, were the designer to sell designs on a price-per-design basis, it appears likely that the importer would purchase only those designs it contemplated using, and the designer would charge a higher price per design than that which is provided for in the formula set out in I.A. 75–128, since the designer would seek to recover costs for the time and expense spent on designs not selected by customers.

The proration formula in I.A. 75–128 appears reasonable on first observation because it seeks to isolate the hourly wages for the designer's service, and to value designs by determining time expenditure and material cost. On reconsideration however, we feel that this formula has a serious shortcoming in that hourly wages are based on the

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artificial circumstances of the contract. In this artificial market, all designs created are accepted, whether utilized or not. Under these circumstances, we do not believe that the standard hourly pay rate has been reasonably obtained.

Finally, we believe that support for our position is found in the case of *Oxford University Press, N.Y. Inc.* v. *United States*, 36 Cust. Ct. 102, C.A.D. 405 (1949). In that case, in arriving at cost of production, the court held that nonrecurring costs such as printing plates must be spread over only those articles actually produced at the time of first importation. With regard to prorating such costs over contemplated productions runs or useful life, the court stated on page 106: "Such tendency however might result in cases of similar nature, in the alleged estimation or calculation of cost on 100,000 or 200,000 copies of the book, which the manufacturer knew could not be sold. In that event, the nonrecurrent costs would be so small as to be practically negligible, and the duty assessed against that calculation would not be a proper reflection of cost of production." We note that the remaining useful life of the plates could have been viewed by the court in *Oxford* as an asset of the corporation, but was not.

The court also commented on comparisons between tariff laws and regulations and Internal Revenue regulations stating on page 106:

> The analogy between the regulations of the Secretary of the Treasury with respect to the depreciation, capital gains, losses, and the like with respect to other taxes, appearing in the brief of appellant we do not think has any pertinence with respect to tariff laws and regulations.

Internal advice memorandum 75–128 is therefore modified in accordance with this ruling.

(T.D. 78–340)

Valuation; Constructed Value

Date: October 13, 1977
File: R:CV:V
540765 JAS

To: District Director of Customs, Wilmington, N.C. 28401.

From: Director, Classification and Value Division.

Subject: Addition for profit in a constructed value appraisement of polyester knit fabric imported from Ireland; internal advice No. 67/75.

This is in response to your memorandum dated April 17, 1975, file MAN–1DD:CxAPP–1, in which you request internal advice re-

garding the proper basis of appraisement of 100-percent polyester knit fabric and dacron and wool knit fabric sold by (company A) to (company B), Spartanburg, S.C. Both (company A) and (company B), are divisions of (company C), and, therefore, are related parties as defined in section 402(g)(2)(F), Tariff Act of 1930, as amended.

Each of (company C's) divisions operates as an autonomous entity, with its own management making decisions on product lines, styling, selling price, et cetera. Each division which provides products or services to other divisions charges those divisions as if the products or services had been provided by an outside person. This system enables (company C) to monitor the performance of all its divisions. (Company A) produces double-knit fabrics which it ships to (company B). Invoices from (company A) to (company B) reflect (company A's) constructed cost before the addition of a profit percentage. In order for (company A) to charge (company B) an amount equal to (company B's) standard selling price for double-knit fabric to sister divisions, (company C) adjusts the invoice price from (company A) to (company B) periodically to such an amount (first adjustment). In addition, (company C) readjusts the adjusted price from (company A) to (company B) so that the price (company A) charges (company B) will more closely reflect the prices prevailing for such products and services on the domestic market (second adjustment). This second adjusted price appears to include an amount for profit which (company C) believes (company A) actually realizes on its transactions with (company B). In the absence of information to the contrary, we must assume that the second adjusted price minus the invoice price is (company A's) profit.

In a memorandum dated May 13, 1975, file S:C:D5–DGS No. 107, the chief, duty assessment branch, New York Seaport, expresses the opinion that the first adjusted price was determined prior to or concurrent with exportation of the merchandise under consideration. He concludes that since section 402(b), Tariff Act of 1930, as amended, contemplates sales to selected purchasers, and since there is no evidence that the first adjusted price from (company A) to (company B) did not fairly reflect the market value, export value exists for the subject merchandise.

It is your opinion that this fabric should be appraised on the basis of constructed value, pursuant to section 402(d), Tariff Act of 1930, as amended, represented by the invoice price plus an amount equal to the actual profit that (company A) appears to make on its sales to (company B). Counsel for (company A) and (company B) on the other hand, contends that constructed value is represented by the invoice price plus an amount for profit of approximately —— percent, an

addition representative of the profit realized on sales of merchandise of the "same general class or kind" as the merchandise undergoing appraisement, which are made by producers in Ireland for shipment to the United States. See section 402(d)(2), Tariff Act of 1930, as amended.

From the information submitted, we agree with your position. The file is unclear whether the first adjustment and/or the second adjustment is made before or after the merchandise is exported from Ireland. In addition, it appears that the second adjusted price is designed to approximate a price which (company A) would have charged (company B) if these parties had not been related. The second adjusted price, rather than the first adjusted price, therefore, would probably approximate the "market value" of this merchandise. See section 402(f)(1)(B), of the Tariff Act. Accordingly, the file does not support the basing of an export value on the first adjusted price.

The merchandise is not sold in its condition as imported. Therefore, appraisement cannot be made on the basis of U.S. value.

The proper method of appraisement, we believe, is constructed value, section 402(d) of the Tariff Act. Paragraph (d)(2) thereof, provides that the constructed value of imported merchandise should include:

> an amount for general expenses and *profit* equal to that *usually reflected* in sales of merchandise of *the same general class or kind* as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States. [Emphasis added.]

Where an exporter sells merchandise to a related importer who is the sole importer of merchandise of a class or kind from the country of exportation, the exporter's actual profit will be used for constructed value purposes unless there is persuasive evidence that the profit is not fairly reflective of an amount "usually reflected" in an arms length transaction. See section 402(g), Tariff Act of 1930, as amended.

Counsel for (company A) and (company B) has submitted an extensive study of levels of profitability in the Irish textile industry. The study discusses the following categories of textile producers in Ireland: (1) Those who export woven wool fabric to the United States, (2) those who export double jersey fabric to countries other than the United States, (3) those who export woven wool fabric to countries other than the United States, and (4) those who produce double jersey fabric for sale in Ireland. The study notes in part that aside from (company A) there are no other producers in Ireland who export double-knit jersey to the United States. Counsel has also submitted

a brief, copy attached, in support of its contention that "polyester double-knit fabrics" are of the same general class or kind (sec. 402(d)(2), Tariff Act of 1930, as amended), as "woven wool suiting" produced in Ireland and exported to the United States. Consequently, he argues, it is the profit of the latter, rather than the former, which must be considered in a constructed value appraisement. Profit realized on sales to countries other than the United States, or on sales in Ireland, may not be considered.

Counsel argues that both the courts and the Customs Service have generally interpreted the phrase "same general class or kind" broadly. He cites selected portions of the Customs Simplification Act of 1956 and the "Fundamentals of Duty Assessment," as well as numerous court cases, in support of this proposition. We will analyze the cited material we consider relevant.

In *Omni Products Co.* v. *United States*, R.D. 11291 (1967), the court, in discussing "merchandise of the same class or kind" and "merchandise similar to" stated " * * * *and without exploring at length the distinction in meaning thus intended*, it seems clear that the former is broader and more inclusive than the latter." [Emphasis added.] As of 1967, the court had not seen fit to set forth distinguishing guidelines. The "Fundamentals of Duty Assessment," at page 4–71, merely echoes the principal in *Omni* and states "(The) phrase 'same general class or kind' * * * requires only that the items compared must be *products of the same industry and must be within the same general class of merchandise.*" [Emphasis added.] This language is hardly more definitive than the language in *Omni*.

Counsel indicates that case law establishes two general areas of inquiry in determining whether products are of the "same general class or kind," namely, (1) similarity with respect to the cost and method of production, and (2) similarity of end use. With respect to (1), the court, in *United States* v. *The Heyman Co., Inc.*, C.A.D. 755 (1960), concluded that "pads" used in the bedding and upholstery industries were "similar" though composed of different fibers. The court noted the method of making the pads was "similar," as was their end use. A difference in material content and in their prices did not preclude a finding that the pads were similar. Counsel concludes that a finding of "similarity," a fortiori, mandates a finding that the pads are of the "same general class or kind." This case, we believe, is distinguished on the facts. In *Heyman*, the component material in one pad was istle while the material in the other was henequen. Both are hard fiber obtained from the leaves of the Agave of central Mexico. (See "The Condensed Chemical Dictionary," seventh ed., Van

Nostrand Reinnola Co., N.J.) The court's decision appears to have been predicated on the fact that the fibers involved were both natural, and species of the same genus. This case, in our opinion, is not relevant in a determination of whether a natural fiber and a synthetic fiber are of the same general class or kind. Moreover, the case sets forth no standards applicable to wearing apparel. In *Marine Products Co.* v. *United States*, C.A.D. 462 (1951), the court held that differences in component fish, firmness, and color, did not prevent "tunafish of the Mexican pack" from being of the same general class or kind as "tunafish of the American pack." The cost of packing was the same. "The difference," stated the court, "was one of quality." Again, this case is distinguished by the fact that the tunafish in question were species of the same genus. Likewise, we see no relevance in that case to the issue of wearing apparel. This analysis is applicable as well to the decisions in *A. N. Deringer* v. *United States*, R.D. 8708 (1956), and *Star-Kist Foods, Inc.*, v. *United States*, C.A.D. 666 (1957). The court, in *United States* v. *Hemsoth-Kerner Corp.*, C.A.D. 252 (1943), continued this line of reasoning by holding that printing type sold in Germany, though slightly different than printing type sold for export to the United States, was nonetheless of the "same general character." The court found that they were produced from the same raw material and cost approximately the same to produce. However, a finding that "printing type" is "printing type" is not authority for finding that "polyester double-knit fabric" is "woven wool fabric." The court's reasoning in *Deringer* illustrates the point. In that case the court in part reasoned, with respect to interior house doors manufactured in Canada, that "any interior house door would be merchandise of the 'same class or kind'." That the doors in question were interior, rather than exterior, and were of a ventilated type covered by patent, warrants the conclusion that they were wood, or at least of the same constitutent material as the doors to which they were compared. The holding that "patented interior house doors" are of the same general class or kind as "nonpatented interior house doors" is not dispositive of the issue presented here. A finding by the court that "patented, interior house doors of wood" were of the same general class or kind as "patented or nonpatented, interior house doors of aluminum," would be most relevant. However, the *Deringer* court did not so find.

The issue addressed in *Hong Kong Fashions, Ltd.* v. *United States*, R.D. 11751, a 1971 wearing apparel case, was the absence of proof of the usual general expenses and profit of other producers of merchandise of the same class or kind as the merchandise being appraised. Such "other producers" were garment manufacturers in Hong Kong. The issue was not one of "same general class or kind." Therefore,

counsel's proposition that "custom-made men's wool wearing from Hong Kong" is of the same general class or kind as "garments manufactured in Hong Kong" is unsupported by the facts. Similarly, the issue in *New York Credit Men's Adjustment Bureau* v. *United States*, 342 F. Supp. 745 (1972), was the lack of proof relating to general expenses and profit of manufacturers in Jamaica of merchandise of the same general class or kind as the merchandise under appraisement, so as to overcome the presumption of correctness attaching to the appraisement. The opinion contains no discussion at all of what constitutes merchandise of the same general class or kind. The case of *Bell Importing Co.* v. *United States*, R.D. 11196 (1966), considered men's and women's tailormade clothing from Hong Kong. The court simply said that the profit added in sales to the instant importer was the profit "ordinarily" added by producers of merchandise of the same general class or kind. There was no discussion of the phrase "same general class or kind" and how it related to the case. The court did not discuss the component materials from which the clothes were made. Assuming the material was the same, there is no indication of what the court's view would have been had some men's suits been of cotton and some of polyester and dacron, or if all men's suits of cotton were compared to all women's suits of polyester and dacron.

With respect to (2), similarity of end use, the case of *Descoware Corp.* (*Westland*) v. *United States*, R.D. 11297 (1967) held that skillets with wooden handles, produced one at a time and at greater cost were nevertheless of the same class or kind as mass-produced iron handled skillets and covers produced at a lower per-unit cost. As with *Hong Kong Fashions* and *New York Credit*, *supra*, this case turned on plaintiff's inability to overcome the presumption of correctness of the appraisement. There was no substantive discussion of "such or similar" or "same general class or kind." Assuming, by way of argument, that the court had expressly held the skillets to be of the same general class or kind, such a finding would not be dispositive of the issue here. In *National Carloading Corp.* v. *United States*, C.A.D. 1080 (1972), the court concluded that finished mica condensor sections were not of the same class or kind as unfinished mica condensors. Likewise, in *United States* v. *Henry Maier*, T.D. 46378 (1933), the court concluded that "velvets in the gray" and "finished velvet" were not of the same general class or kind. From these cases counsel argues that further processing of a product (velvet in the gray and unfinished mica condensor sections) which is a component of the final product (finished velvet and finished condensors) qualifies the two component products as being of the same general class or kind. Without passing on the validity of this argument, we believe it is irrelevant in a comparison of

natural fiber to a synthetic, manmade fiber. One is not a component material of the other, regardless of the degree of further fabrication to which it may be subjected. We believe the additional conclusion in *National Carloading* that unfinished condensor sections of materials other than mica are not of the same general class or kind as unfinished mica condensors supports the conclusion that polyester double-knit fabric is not the same general class or kind as woven wool suiting.

Counsel cites *Golding-Keene Co.* v. *United States*, C.D. 2172 (1960) and *United States* v. *The Carborundum Co.*, C.A.D. 1172 (1976). However, since the former case involved an American manufacturer's petition, section 516(b), Tariff Act of 1930, as amended, and the latter case classification issues under general interpretive rule 10(e)(i), Tariff Schedules of the United States, they are not relevant to the issue here presented.

We endorse counsel's statements on page 11 of its brief as illustrative of the problems involved in a determination of questions of "same general class or kind":

> Typically the parameters of "class or kind" have been charted on *a case-by-case basis* with reference only to the *specific fact pattern in question*. Many of these cases * * * *do not clearly delineate the court's rationale for circumscribing a particular class or kind* * * * the court generally addresses the scope of the appropriate class or kind *only briefly and in conclusory terms*. [Emphasis added].

Applying the case-by-case approach, several recent headquarters decisions have taken a more restrictive view of the term "same general class or kind" than proposed by counsel for (company A). These include: (1) Aircraft parts or assemblies that constitute part of an airframe, for example, the fuselage, the wings, and the tail section are not within the same general class or kind of merchandise as aircraft doors (R:CV:V 540829 LLR, Aug. 23, 1976); (2) all automobiles are not of the same general character (R:CV:V 540738 RG, Feb. 8, 1976); (3) toy racing cars and accessories are not of the same general class or kind as the broad category "toys and games" (R:CV:V 541000 JAS, Jan. 25, 1977).

There are marked differences that lead us to conclude "woven wool" and "dacron polyester fabric" are not of the same general class or kind. Chief among these is the fact that wool is a natural fiber while dacron polyester is synthetic or manmade. Most, if not all, the cases counsel cited sought to compare species of the same genus. In addition, although counsel states on pages 8 and 9 of his brief that the processes of producing double-knit and woven fabrics are "remarkably similar," the fact is that in the former case a knitting machine is used while in the latter case a shuttleless loom is used. Moreover, it appears that knit

fabric and woven fabric are in fact manufactured by separate and distinct processes. (See Potter & Corbman, "Textiles: Fiber to Fabric," McGraw-Hill, Inc., 1967.) Knit and woven fabrics are classified in separate parts of the tariff schedules. While not necessarily conclusive, an examination of the sample swatches submitted by counsel indicates that the wool and polyester knit are almost identical in weight. However, there are marked visual and textural differences. The wool fabric is noticeably finer and homogeneous in surface texture, while the polyester fabric has a patterned surface texture and is more elastic.

The totality of circumstances in this case lead us to conclude that woven wool fabric is not of the same general class or kind as the fabric manufactured by (company A). To hold that woven wool fabric is of the same general class or kind as manmade knit fabric would lead to the conclusion that all fabric is of the same general class or kind.

We must therefore accept the actual profit realized by (company A) in its transactions with (company B) unless there is persuasive evidence that the profit realized by (company A) is not fairly reflective of an amount "usually reflected" in an arm's length transaction. The file does not reflect such evidence. Accordingly, we agree with your opinion that polyester fabric and knit polyester and wool fabric imported by (company B) should be appraised under constructed value, as represented by the invoice price from (company A) to (company B) plus an amount for profit equal to the second adjustment.

(T.D. 78-341)

Entry; Shipment of Alaskan Crude Oil to Foreign Registered Storage Vessels

Date: November 15, 1977
File: ENT 1-01 R:E:E
304516 M

DEAR ——: This is in reply to your letter of May 5, 1977, in behalf of (name) requesting a ruling from Customs in regard to the transshipment of Alaskan crude oil through the Panama Canal to refineries on the Atlantic and Gulf coasts of the United States and in Puerto Rico.

Under the contemplated movement, VLCC's will transport Alaskan crude oil from Valdez, Alaska, to a point off the coast of Panama, where the oil will be placed in a storage vessel, which will serve as a floating transshipment terminal. The Alaskan crude oil will subsequently be transferred from the storage vessel to lightering tankers

and taken through the Panama Canal to its port destination in the United States on the Atlantic or Gulf coasts or in Puerto Rico.

We understand that the storage vessel would be foreign registered. Furthermore (name), contemplates using the storage vessels as a temporary measure and plans to construct in Panama a permanent bonded onshore terminal, similar to U.S. Customs bonded facilities, which would handle this Alaskan crude. We understand that the storage vessel and later the permanent bonded onshore terminal would only handle U.S. crude oil. We must advise you that if any foreign oil were placed in the same storage vessel of the same bonded onshore terminal with U.S. oil and thus the foreign and domestic oil would become commingled, this action would result in causing the entire amount of crude oil in that vessel or tank to become dutiable.

It is our opinion that your contemplated movement via storage vessel is in reality an in-transit movement from one part of the Customs territory of the United States (Alaska) to another part of the Customs territory of the United States (the Atlantic or Gulf ports in the United States or Puerto Rico). An exportation as defined by Customs in section 113.55(a) of the Customs Regulations has not taken place because the intent at the time the oil is shipped from Valdez, Alaska, is to transport the oil to the appropriate United States or Puerto Rican port via storage vessel off Panama, provided such movement subsequently takes place, However, if the crude oil is subsequently diverted into the commerce of Panama or any other foreign country, such oil would then be considered as exported. Crude oil placed into the storage vessel for subsequent transfer to a lightering tanker for oncarriage to the port in the U.S. mainland or Puerto Rico would not be considered as entering the commerce of Panama.

This ruling as to the exportation of the merchandise is limited only to the Customs merchandise entry laws and regulations and does not affect the laws administered by other Government agencies. It is our understanding that domestic oil laden on a foreign vessel is considered exported under the laws administered by the Department of Commerce and an export license and declaration are required.

We have received information that the storage vessels will be anchored off the coast of Panama in what the United States considers international waters. Therefore, when the lightering vessels arrive at the United States or Puerto Rican port of arrival, the arrival of such vessels must be reported and the manifest must be submitted to Customs. No other documentation need be submitted to Customs at the port of arrival.

Until we know the full nature of the contemplated bonded onshore facility and in particular, the control exercised over such facility by

the Panamanian Government, we are unable to comment as to whether the movement is an intransit movement or as to the type of documentation needed by Customs at the port of arrival for the release of the merchandise.

You indicate that it is uncertain whether the storage vessel to be used as a floating terminal would be able to anchor at all times. In the event weather conditions or the depth of the water or the composition of the bottom make it impossible to anchor the storage vessel permanently at the same location at all times, it would be necessary to move it within a defined area off the coast of Panama. We believe the movement of the storage vessel under these circumstances away from its usual anchorage position and its subsequent return to this same location, at which all transshipments of oil to and from the storage vessel would be made, would not constitute a transportation of merchandise within the meaning of section 27, Merchant Marine Act, 1920, as amended (46 U.S.C. 883). This would be so because the oil would not be transported for any part of its transportation between coastwise points in the storage vessel. However, vessels transporting oil from Valdez to the storage vessel and from the storage vessel to the U.S. ports must be U.S. coastwise-qualified vessels as required by section 883 of title 46, United States Code, mentioned above, and section 4.80, Customs Regulations (19 CFR 4.80).

If the storage vessel is located outside recognized Panamanian territorial waters, it will be considered for purposes of the U.S. clearance laws (46 U.S.C. 91) located at a place on the high seas and not at a foreign port or place, Consequently, the vessel will not be required to clear for such place. The lightering vessels need only report arrival when they arrive in the United States or Puerto Rico from the storage vessel. However, if the storage vessel is located inside recognized Panamanian territorial waters, or if the oil is transshipped at an onshore terminal, the VLCC's must clear from Valdez and the lightering vessels must report arrival and enter when they arrive in the United States or Puerto Rico.

We trust that this answers your questions.

(T.D. 78-342)

Drawback; Definition of "Manufacturer"

Date: November 29, 1977
File: DRA-1-R:CD:D
208305 S

Re request for internal advice, definition of manufacturer for drawback purposes.

THE REGIONAL COMMISSIONER OF CUSTOMS,
Chicago, Ill. 60603

DEAR SIR: You asked whether the actual manufacturer of products for export with drawback under 19 U.S.C. 1313(a) must have a drawback rate authorization or whether a drawback authorization for the importer and drawback claimant is sufficient.

Company A imports certain raw material for manufacture into products for export under 19 U.S.C. 1313(a). The actual manufacturing operation is conducted by company B, an independent contractor, under the following circumstances:

1. Company A retains title to the material at all times;
2. Company A insures the merchandise at all times;
3. Company A provides company B with many if not all of the materials used in the manufacture;
4. Company B manufactures the products under specific instructions from and according to a process owned by company A;
5. Company A has the right to exclusive use of certain equipment which it leases from company B for use in the manufacture of the product.

Company A is the shipper, exporter, and drawback claimant.

Section 22.3(a) of the Customs Regulations provides that "*Each manufacturer* or producer of articles intended for exportation with benefit of drawback * * * shall make application prior to the exportation of such articles for the establishment of a rate of drawback. * * *" [Emphasis added.] Section 22.4 describes the record-keeping requirements that apply to the manufacturer of articles which will be the subject of drawback claims. Section 22.21(a) explains that the drawback normally is payable to the exporter or his agent.

The regulations clearly require the actual manufacturer, company B, to apply for and receive a drawback rate authorization before drawback is payable to company A, the exporter. Company A is not required to have a drawback rate authorization of its own, provided the company claims drawback under 19 U.S.C. 1313(a) and provided all the manufacturing is performed by company B.

The agency rulings in T.D. 55027(2) and T.D. 55207(1) apply to cases arising under the substitution drawback statute but not to those under 19 U.S.C. 1313(a). Accordingly, the manufacturer in this case is the company which in fact uses the raw material to make the exports. The manufacturer must have a rate of drawback to enable the exporter to collect drawback.

(T.D. 78-343)

Customs Power of Attorney

Date: December 14, 1977
File: ENT 1-0 R:E:E
305313 K

DISTRICT DIRECTOR OF CUSTOMS,
Laredo, Tex. 78040

DEAR SIR: This refers to your letter of December 6, 1977, asking whether a U.S. corporation may give a Customs power of attorney to an employee who is a Mexican citizen residing in Mexico.

As you correctly stated, neither the Customs Regulations nor the manual have any provision covering this question. We conclude that a resident corporation may grant a power of attorney to an individual who is not a citizen or resident of the United States provided the corporation has an adequate bond against which we can proceed if necessary to protect the revenue or insure the enforcement of Customs and related laws.

(T.D. 78-344)

Sales between Selected Purchasers

U.S. Customs Service position on sales to selected purchasers; notice of acquiescence in *D. H. Baldwin* v. *United States*, C.A.D. 1208 (June 1, 1978); T.D. 76-118 modified

The decision of the Court of Customs and Patent Appeals in *J. L. Wood* v. *United States*, C.A.D. 1139, 505 F. 2d 1400, (1974) concerned the criteria to be used in determining whether the price to a selected purchaser fairly reflects the market value so as to establish export value within the meaning of sections 402(b) and (f)(1)(B), Tariff Act of 1930, as amended. In T.D. 76-118, 10 Cust. Bull. 206 (1976), the Customs Service interpreted *J. L. Wood* as permitting the use of six standards for comparison purposes in those instances where the evidence necessary to establish a market value is lacking; that is, where there are sales only to related selected purchasers, or sales only to one unrelated selected purchaser. In *D. H. Baldwin Co.* v. *United States*, C.A.D. 1208 (June 1, 1978), the Court of Customs and Patent Appeals ruled that the use of cost of production, home market sales and third country sales, as listed in T.D. 76-118, for comparison purposes in determining whether a proposed export value

fairly reflects market value, is an improper application of export value. Accordingly, in order to conform future appraisements to the *Baldwin* decision, T.D. 76–118 is amended by this notice in the manner set forth below.

Although the *Baldwin* court held that the use of three of the criteria listed in T.D. 76–118 is improper, it specifically refrained from ruling on the propriety of using the other three factors listed therein, circumstances of sales, relative markups of the importer and exporter, and quantities and level of trade. The court did state that its ruling did not necessarily preclude establishing an export value for merchandise based on sales to a single selected purchaser if the price "fairly reflects the market value of the merchandise." Additionally the court cited *Spanexico Inc.* v. *United States*, 64 CCPA ——, C.A.D. 1176, 542 F. 2d 568 (1976), *American Greiner Electronic, Inc.* v. *United States*, 79 Cust. Ct. ——, C.D. 4718, 441 F. Supp. 915 (1977), and *National Carloading Corp.* v. *United States*, 57 Cust. Ct. 758, A.R.D. 215 (1966), as indicating that under the above circumstances, in order to establish that the price fairly reflects the market value, consideration must be given to whether the sales were at arm's length and any evidence showing the relationship between the parties.

The Customs Service acquiesces in the decision of the Court of Customs and Patent Appeals in *Baldwin*. Accordingly, in instances where sales of merchandise have been made only to selected related purchasers or only to one unrelated selected purchaser, an export value may be established provided adequate evidence is presented to Customs showing that the sales were made at arm's length and that the relationship between the parties does not preclude a finding that the price fairly reflects the market value. Evidence which will be accepted by Customs to prove that a sale was an arm's length transaction and showing the relationship between the parties, includes but is not limited to circumstances of sales, relative markups of the importer and exporter, quantities and level of trade, the presence or absence of those "costs" commonly referred to as "assists," as well as that relating to those factors listed in 19 U.S.C. 1401a (g)(2).T.D. 76–118 is modified accordingly.

Liquidation of entries and action on protests which was suspended pending the publication of this notice, as well as future appraisements of merchandise, will be made in accordance with this announcement.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs Officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest with recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings. Attention: Legal Reference Area, Room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. These copies will be made available at a cost to the requester of 10 cents per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Decision previously listed in earlier issues of the CUSTOMS BULLETIN are now available in microfiche format through subscription. It is anticipated that additions to the microfiche will be made quarterly. The cost for the first set of microfiche is $2.55 (15 cents per sheet of fiche). Requests for this first set and for subscriptions should be directed to the legal reference area. Subscribers will automatically receive updates as issued and will be billed accordingly.

Date: September 22, 1978.

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

Date of decision	File No.	Issue
8–16–78	103302	Instruments of international traffic: "Plastic Hubs" used for the transportation of video cassette recording tapes are considered "instruments of international traffic" within meaning of 19 U.S.C. 1322(a)
8–16–78	103574	Carrier control: foreign-built containers may be used only in incidental local traffic in the course of their use in international traffic
8–7–78	103575	Carrier control: entry and clearance requirements for foreign vessels engaged in scientific research; scientific observers are not passengers within the meaning of the coastwise trade laws

Date of decision	File No.	Issue
8-24-78	103583	Carrier control: a person taken aboard a foreign vessel between coastwise ports for the purpose of providing lectures and demonstrations of Alaskan Indian lore is not a "passenger" within the meaning of the coastwise trade laws
8-30-78	709319	Prohibited and restricted importations: rush or broadleaf soft flag harvested in Canada may be imported provided phyto-sanitary certificate is obtained
9-5-78	709390	Country of origin marking: marking padded toilet seats with hinged covers may be accomplished by securely affixing durable tags to a hinge, or by attaching a durable pressure sensitive label to either the seat or cover
8-25-78	709395	Prohibited and restricted importations: Cuban cigars purchased in Ireland are prohibited merchandise without an FAC license
8-29-78	049159	Classification: ornamented shoe upper
8-29-78	053525	Classification: ice cream cones and plastic drinking straws
8-23-78	055130	Valuation: wedge-type sling-back dress sandal; ASP
8-30-78	055140	Classification: all-terrain motor vehicle designed to carry passengers
8-23-78	055597	Duty-free entry: whether Form A is required when duty-free treatment is claimed other than under GSP
8-30-78	056509	Classification: hat braid
8-29-78	056510	Classification: rubber arch support "cookies" used in the soles of jogging shoes
8-22-78	056660	Classification: rectangular brass bars; interpretation of the terms "thickness" and "rectangular" under headnote 3(a), Part 2C, Schedule 6, TSUS
9-5-78	056676	Classification: wicker and straw decorator trunks with storage capabilities
7-13-78	056810	Classification: hand puppets
9-5-78	056818	Classification: split drive pin fastener used with pneumatic guns
7-12-78	056859	Classification: racquetball wristband
8-31-78	056911	Classification: scroll-cut tinplate
8-22-78	056926	Classification: snowmobile boot
8-30-78	056946	Classification: plastic Clydesdale horse and cart
9-5-78	056974	Classification: plastic toy shapes imported in bulk for packaging into toy building sets
8-29-78	057001	Classification: skin-diving equipment—boots, gloves, hood, jacket and pants
8-18-78	057015	Classification: PVC travel cosmetic case with snap closing flap
9-1-78	057063	Classification: pile driver and extractor used on sheet piling in sewage construction applications
9-5-78	057065	Classification: dental floss holder/toothpick combination

Date of decision	File No.	Issue
8-29-78	057075	Classification: yarn beam for holding warp thread during weaving
8-31-78	057083	Classification: 60/100 MVAR+ shunt reactor, used to control high-voltage systems
8-29-78	057101	Classification: non-return value for preventing the backflow of contaminated water in water systems
8-29-78	057132	Classification: plastic covers for microfilm viewer
9-1-78	057152	Classification: general purpose plastic containers
8-29-78	057153	Classification: metal perforating press
8-30-78	057158	Classification: disposable toothbrush with dentrifice impregnated in the bristles
8-30-78	057173	Classification: automobile spotlight designed to be plugged into an automobile cigarette lighter receptacle
8-30-78	057181	Classification: kite
8-30-78	057199	Classification: plastic baby's bib
9-5-78	058435	Classification: MICROLAB tissue processor—an electronic device for cancer research

ERRATA

In CUSTOMS BULLETIN, vol. 12, No. 34, dated August 23, 1978, in T.D. 78-268-R, on page 24, correct first line to read:

(R) Piece goods, bleached, dyed and/or printed; and redyed or

In CUSTOMS BULLETIN, vol. 12, No. 36, dated September 6, 1978, in T.D. 78-293-S, on page 7, correct third line to read:

Merchandise: Caustic soda.

In CUSTOMS BULLETIN, vol. 12, No. 36, dated September 6, 1978, in T.D. 78-293-W, on page 8, correct second line to read:

Articles: Agricultural implements and/or industrial equipment.

In CUSTOMS BULLETIN, vol. 12, No. 37, dated September 13, 1978, in T.D. 78-301-W, on page 7, correct 10th line to read:

Revokes: T.D. 55129-G, superseded, and successorship from Roselon Yarns, Inc.

In CUSTOMS BULLETIN, vol. 12, No. 34, dated August 23, 1978, in T.D. 78-268-P, on page 24, correct first line to read:

(P) O-secondary butyl phenyl-n-methyl carbamate ("BPMC").—

In CUSTOMS BULLETIN, vol. 11, No. 19, dated May 11, 1977, in T.D. 77-118, on page 4, the surety for Robideau's Express, Inc., should be corrected to read:

Fidelity & Deposit Co. of Maryland

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4766)

J. E. BERNARD CO. *v.* UNITED STATES

Tuning pins—Parts of stringed musical instruments

Merchandise invoiced as tuning pins is used to tighten or loosen guitar strings. It was classified by Customs under TSUS item 726.55 as "Parts of stringed musical instruments provided for in item 725.06 (except strings and tuning pins)." Plaintiff contended proper classification is under TSUS item 726.45 as "Tuning pins."

Evidence failed to overcome presumption of correctness and sustain burden of proving that classification made by Customs was erroneous and that classification urged by plaintiff was correct. *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88,

C.A.D. 735 (1960); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). Legislative history treated and discussed. *United States* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534, 544 (1940).

EVIDENCE—PRESUMPTION—BURDEN OF PROOF

A presumption of correctness attaches to the Customs' classification and plaintiff has burden of proving not only that the classification is erroneous, but also that the classification urged by the plaintiff is correct.

LEGISLATIVE HISTORY

"When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States* v. *Amer. Trucking Ass'ns., supra.*

Court No. 76-3-00651

Port of Chicago

[Judgment for defendant.]

(Decided September 12, 1978)

Barnes, Richardson & Colburn (*Steven P. Sonnenberg* and *Thomas D. Terpstra* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*Joseph I. Liebman*, trial attorney), for the defendant.

LANDIS, Judge: This written decision of the court is the outgrowth of a trial held before me in Chicago, Ill., in August 1977. The parties thereafter successively filed briefs in May and July 1978 and a reply brief was filed by plaintiff in August 1978.

The goods in question were imported from West Germany into the Port of Chicago in November 1974 and May 1975 and were invoiced as "Tuning pins M 6 G," "Tuning pins M 6," and "Tuning pins No. 14-586/14-587."

The merchandise was classified by Customs under TSUS item 726.55, as modified,[1] as "Parts of stringed musical instruments provided for in item 725.06 (except strings and tuning pins)".

Plaintiff claims the proper classification is under TSUS item 726.45 [2] "Tuning pins."

As stated by plaintiff in its brief, page 3:

> * * * An examination of this product [tuning pins No. 14-586/14-587] reveals that it consists of a metal pin with an opening at one end. The opposite end is fitted into a worm gear which may be actuated by a handle or button which is perpen-

[1] Modified by T.D. 68-9 and dutiable at the rate of 17 per centum ad valorem.

[2] Modified by T.D. 68-9 and dutiable at the rate of 17 cents per 1,000 pins, plus 6 per centum ad valorem.

dicular to the pin. When the button is turned the worm gear acts on the pin so as to rotate it. The rotation ratio is 12 turns of the button to one turn of the pin.

The other two items are identical to each other except that the M6G is yellow-gold covered while the M6 is chrome. Although they differ in appearance from the 14–586/14–587 model, they operate under a comparable principle.

The merchandise is used as parts of guitars, to tighten or loosen the guitar strings so that the instruments have the proper pitch.

At the outset, as has been urged by plaintiff, and as has been virtually conceded by defendant, it is clear that the claimed section of TSUS, item 726.45 relied on by plaintiff, is an *eo nomine* provision.

However, on the other hand, in considering the evidence introduced in this case, we are also aware of the presumption of correctness which favors the customs classification. *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88, C.A.D. 735 (1960); *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

The evidence consists of the testimony of three witnesses for the plaintiff and one for the defendant and a number of exhibits.

Stanley Snyder, a purchasing agent for Gibson Inc., the actual importer in this case, was the first to testify. He identified samples of the imported articles. For example, on direct examination, he identified plaintiff's collective exhibit 1 as "a complete set of bass machine heads or tuning pins." (R. 7.) Snyder read the invoices as stating: "One is for 500 sets of tuning pins, M–6G; the other one is for 400 sets of tuning pins, chrome-plated." (R. 12.) He identified another exhibit as "M–6 tuning pins." (R. 16.) During voir dire though, significant damage was done to plaintiff's case by the statement appearing on the cover of the box in which some of the merchandise was imported, as appears in the following testimony (R. 20–21):

MR. TERPSTRA [plaintiff's counsel]. I would like to move plaintiff's exhibit 4 into evidence.

JUDGE LANDIS. Any objection?

MR. LIEBMAN [defendant's counsel]. May I examine on voir dire, Your Honor?

JUDGE LANDIS. Yes.

MR. LIEBMAN Mr. Snyder, plaintiff's exhibit 4 for identification you described as a collective set of six of the M–6G machine heads; is that correct?

THE WITNESS. Yes.

MR. LIEBMAN. Are they contained in a box?

THE WITNESS. Yes.

MR. LIEBMAN. Is this the box that they are received in when you receive the shipment?

THE WITNESS. Yes.

MR. LIEBMAN. Is the box the same type of box enclosing the merchandise involved in the entries which are the subject of this court case?

THE WITNESS. Yes.

MR. LIEBMAN. Does the box contain on its cover any descriptions of the contents?

If you would like to, you may examine it.

[Handling to the witness.]

THE WITNESS. It says—Yes, it does. It says, "The world's finest guitar and bass machine heads."

MR. LIEBMAN. To your knowledge, does it say, anywhere on that box, "tuning pins"?

THE WITNESS. No.

Plaintiff's second witness, Julius Bellson, was a "musicologist" at Gibson approximately 40 years and in addition to composing music had served with Gibson as production manager, industrial manger, and treasurer. This witness of plaintiff stated he would not confine the definition of "turning pin," as set forth in "Webster's New International Dictionary" (plaintiff's exhibit 6):

> *tuning pin or peg. Music.* A pin to which the strings are fastened, as in pianos and in instruments of the violin family.

to instruments such as pianos and violins, since other instruments such as guitars, mandolins and banjos have pegs. Bellson's testimony was further in substance that all of plaintiff's tuning devices were "tuners;" that a difference existed between "tuning pins" and "tuners" and he did not refer to the exhibits representing the imported merchandise in this case as "tuning pins" but as "tuners".

The third witness for plaintiff, Walter Fuller, also was a retired 40-year veteran at Gibson. He testified that he would refer to the exhibited items as tuning keys, tuning pegs, tuning pins, or machine heads depending on with whom he was speaking. Whichever appellation was used by the other party, he would use. Fuller did add that if he were preparing a parts list, he would refer to the articles as "machine heads." (R. 99).

The sole witness for defendant was Joseph Richard Merkel, president of Kluson Manufacturing Co. which manufactures and sells metal and plastic parts for stringed musical instruments. The following exchange occurred during direct examination of Mr. Merkel (R. 114):

> Q. Have you, or to your knowledge, has the Kluson Manufacturing Company ever sold a tuning pin?—A. We have never sold a tuning pin. No. That is correct.
>
> Q. But you have sold machine heads; is that correct?—A. Correct, we have sold machine heads.
>
> Q. Do you understand "machine heads" to be a different article of commerce from a "tuning pin"?—A. Yes, I do.

Based upon this evidence and having observed the witnesses and their demeanor on the witness stand, it is my opinion that the presumption of correctness attaching to the Customs' classification of this imported merchandise has not been rebutted, that plaintiff has not sustained the burden of proving the classification by Customs was erroneous and plaintiff's claimed classification was correct. Accordingly, defendant must herein prevail.[3]

It is also noted that in defendant's brief it is argued that pertinent sources of legislative history demonstrate that successive Congresses have intended the tariff provision for "tuning pins" to be limited to specially designed pins of the type for tuning pianos and harps.

Plaintiff argues in its reply brief that the legislative history is not relevant as the common meaning of the term "tuning pin" is clear and unambiguous. This argument by plaintiff is difficult to understand for, as has heretofore been pointed out, plaintiff's evidence on the meaning of the term "tuning pin" was ambiguous and in particular plaintiff's witness Bellson stated he did not agree with the dictionary definition plaintiff introduced into evidence (plaintiff's exhibit 6). It should also be noted that no claim has been made nor any contention advanced that the commercial meaning is different from the common meaning, which in the absence thereof are presumed to be the same. *August Bentkamp* v. *United States*, 40 CCPA 70, C.A.D. 500 (1952); *United States* v. *C. J. Tower & Sons of Buffalo, N.Y.*, 48 CCPA 87, C.A.D. 770 (1961).

A leading case on the significance and relevance of legislative history is *United States* v. *Amer. Trucking Ass'ns.*, 310 U.S. 534 (1940), wherein the Supreme Court of the United States stated (pp. 542–544):

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute * * *.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with

[3] As plaintiff has made no showing that the imported merchandise is classifiable as "tuning pins" under TSUS item 726.45, there is no reason to consider its citation of General Interpretative Rule 10(ij).

> the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." * * *

See also, *United States* v. *Kung Chen Fur Corporation*, 38 CCPA 107, C.A.D. 447.

I now will examine the legislative history surrounding "tuning pins."

The first mention of "tuning pins" in the tariff laws appeared in the Tariff Act of 1922:

> PAR. 1443. Musical instruments and parts thereof, not specially provided for, pianoforte or player actions and parts thereof, cases for musical instruments, pitch pipes, tuning forks, tuning hammers, and metronomes, strings for musical instruments composed wholly or in part of steel or other metal, all the foregoing, 40 per centum ad valorem; *tuning pins, $1 per thousand and 35 per centum ad valorem;* violins, violas, violoncellos, and double basses, of all sizes, wholly or partly manufactured or assembled, $1 each and 35 per centum ad valorem; unassembled parts of the foregoing, 40 per centum ad valorem. Ch. 356, 42 Stat. 858, 919–920 (1922). [Emphasis supplied.]

Legislative history demonstrates that the tuning pin provision was incorporated in paragraph 1443 at the behest of the piano industry and for its benefit. Testifying before the Ways and Means Committee of the House, one Alfred L. Smith, representing the Music Industries Chamber of Commerce of New York (an umbrella organization of eleven musical national trade associations), reviewed the tariff history of piano parts. He stated [hearings on general tariff revision before the House Committee on Ways and Means, pt. 5, Schedule N, 66th Cong., 3d Sess. (1921), p. 3435]:

> * * * I wish to call the attention of the committee to the fact that prior to the war our chief imports under this schedule were certain piano parts, felts, actions, wire, and tuning pins, and also band instruments, and small instruments like violins and similar small goods. * * *

When the First World War impeded the importation of piano parts, he said "our industry was very seriously embarrassed." He explained further:

> The tuning pin, for instance, is a typical example which I will cite to the committee. The tuning pin is a vital article in piano manufacture and an exceedingly difficult thing to manufacture, although it looks very simple to the average person. Before the war there was only one plant of any importance in this country making tuning pins. There are now four well-established plants

> and several minor ones trying to make those. Before the war, four-fifths of the tuning pins were imported from Germany, and now the importations probably do not amount to but one-fifth. And the piano manufacturers wish to have this industry developed in this country so that they can absolutely depend upon it, so that there will be enough facilities to supply the piano manufacturers. [*Id.*, p. 3436.]

The written brief of the Music Industries Chamber of Commerce of New York stated that:

> The American tuning-pin manufacturers are still going to much time and expense in experimental work to improve quality, so that with adequate tariff protection it is reasonable to expect that the tuning pins will ultimately be sufficiently superior to the foreign article so as to be able to compete entirely on a quality instead of price basis.* * * [*Id.*, p. 3438.]

Thus the "tuning pin" provision always connoted piano pins.

Paragraph 1541(a) of the Tariff Act of 1930, Ch. 497, 46 Stat. 590, 668–669 continued the tariff provision for tuning pins:

> PAR. 1541. (a) Musical instruments and parts thereof, not specially provided for, pianoforte or player-piano actions and parts thereof, violin bow hair, pitch pipes, tuning forks, tuning hammers, and metronomes, all the foregoing, 40 per centum ad valorem; pipe organs or pipe-organ player actions and parts thereof, 60 per centum ad valorem: *Provided*, That for pipe organs or pipe-organ player actions and parts thereof especially designed and constructed for installation and use in a particular church, or in a particular public auditorium at which it is not customary to charge an admission fee, which are imported for that specific use, and which are so installed and used within one year from the date of importation, the rate of duty shall be 40 per centum ad valorem; and the Secretary of the Treasury is authorized to make all needful rules and regulations for carrying out the provisions of this clause; cases for musical instruments, 50 per centum ad valorem; chin rests for violins, 40 per centum ad valorem; bridges for fretted stringed instruments, not specially provided for, 50 per centum ad valorem; strings for musical instruments, composed wholly or in part of catgut, other gut, oriental gut, or metal, 40 per centum ad valorem; *tuning pins, $1 per thousand and 35 per centum ad valorem.* [Emphasis supplied.]

In 1948, the "Summaries of Tariff Information" contained the following "Comment" on tuning pins:

> Tuning pins are pegs for pianos and harps by which tension of the strings can be altered for changes in pitch. Steel tuning pins for pianos are slightly over 2 inches long and about one-fourth inch in diameter. The end driven into the piano plate is cylindrical; the projecting end is square to fit the tuning wrench, which is known in the trade as a hammer. Smaller but similar pins are

used in harps. [1948 "Summaries of Tariff Information," vol. 15, pt. 8, p. 54.]

As the defendant notes in its brief: "Significantly, 'tuning pins' are specifically excluded from the description in the summaries of pianos and parts thereof, but no exclusionary reference appears in the description contained in the summaries of stringed fretted musical instruments, which include string guitars." The defendant's subsequent deduction appears justified: "This indicates that 'tuning pins,' and 'machine heads,' are different articles for tariff purposes."

The "Summaries of Trade and Tariff Information" provides further support for this distinction. "Summaries of Trade and Tariff Information," schedule 7, volume 3, page 108 (1968) states: "The principal parts of fretted stringed instruments are machine heads, shell picks or plectrums, and bridges." Tuning pins are described later as: "small pegs made from steel wire, which are driven into the frame of pianos and harps and used for attaching the strings. The pins are turned by means of a tuning wrench or 'hammer' to change the tension of the strings for the purpose of adjusting pitch." *Id.*, 168.

Thus, the weight of the evidence, as well as the legislative history, compels the sustaining of the Customs Service's classification of the merchandise under TSUS item 726.55.

The action is dismissed. Judgment shall be entered accordingly.

(C.D. 4767)

WILD HEERBRUGG INSTRUMENTS, INC. *v.* UNITED STATES

Instruments

OPTICAL ELEMENTS—MOUNTINGS—PROVISION FOR PARTS

Phototubes exported from Switzerland in 1970 and 1971 and classified in liquidation upon entry at New York under TSUS item 708.89 as modified by T.D. 68–9 as optical appliances and instruments not provided for elsewhere in part 2 of TSUS schedule 7, *held*, properly classifiable as alternatively claimed by the importer under TSUS item 708.80 as modified by T.D. 68–9 as *mountings* for compound optical microscopes where the evidence establishes that the imported phototube which contains optical elements is mounted on a stereomicroscope, a form of compound optical microscope, to facilitate the subsequent attachment of a camera on a portion of the tube for use in photomicrography, and possesses characteristics which identify it with the host microscope, and as such, is not a part of a camera, but is, if anything, a part of the microscope, for which part Congress has made specific provision in item 708.80 as a *mounting*.

Court No. 72-2-00278

Port of New York

[Judgment for plaintiff.]

(Decided September 14, 1978)

Barnes, Richardson & Colburn (*Richard C. King* of counsel) for the plaintiff.
Barbara Allen Babcock, Assistant Attorney General (*William F. Atkin*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of phototubes which were manufactured in and exported from Switzerland in 1970 and 1971 and classified in liquidation upon entry at New York under TSUS item 708.89 as modified by T.D. 68–9 as optical appliances and instruments not provided for elsewhere in part 2 of TSUS schedule 7, at the duty rate of 31 or 27 per centum ad valorem, depending upon date of entry. It is claimed by the plaintiff-importer that the phototubes should be classified under TSUS item 722.34 as modified by T.D. 68–9 as parts of photographic cameras (other than motion-picture cameras) not containing a photographic lens valued over 50 percent of the value of the part, at the duty rate of 14 or 12 per centum ad valorem, depending upon date of entry. Alternatively, plaintiff claims that the phototubes should be classified under TSUS item 708.80 as modified by T.D. 68–9 as frames and mountings for compound optical microscopes, at the duty rate of 21 or 18 per centum ad valorem, depending upon date of entry. It was stipulated that none of the phototubes in issue contain photographic lenses.

Walter E. Gumpertz, product manager of plaintiff's microscope division, described the function of phototube 256 543 as being illustrative of the function of the phototubes in general. According to the witness this phototube is a beam splitter phototube which is inserted on top of the microscope tube support and underneath the binocular body of the microscope. The tube is capable of varying the relative amounts of light reaching the camera or eyepiece. The tube contains optical elements in the form of relay lenses and prisms. The function of the relay lenses is to compensate for the introduction of the tube into the microscope system. The function of the prisms is to divert the light beam in various ways.

Mr. Gumpertz assembled in court for demonstration purposes a Wild stereo microscope M5A comparable to that illustrated in exhibit 7, utilizing a phototube identical to phototube 256 530 with the exception of a flange having been substituted for a clamping ring for attaching the camera.

The witness assembled components for equipping the microscope for photomicrography by removing the binocular body and inserting the phototube in proper alignment. As inserted, the phototube (through the beam splitter in the left-hand path) picks up part of the image for the camera and, with the exception of a filter in the right-hand path to balance the light intensity of the images, leaves the right-hand path free.

After the binocular eyepiece is reinstalled on top of the phototube the image is identical but slightly enlarged because of the lengthening of the light path caused by the introduction of the tube.

An eyepiece is inserted in the phototube in order to project an image into the camera in the film plane when the microscope is in the proper focus position. The system is designed so that the image observed through the binocular and that created for the camera are in sharp focus at the same time.

The apparatus assembled in court approximates that illustrated at the top of page 2 of exhibit 8. However, it lacked the focusing telescope illustrated in exhibit 8 as marked by the witness. With the addition of the telescope and film the apparatus would have been prepared for taking photographs of the specimen. The equipment fitted on top of the phototube and eyepiece included an adaptor or flange, a shutter piece, camera lens, and film magazine. These parts, without a phototube, are sold as a camera package.

The purpose of the phototube whose operation was demonstrated is to remove 75 percent of the light or image from the left-hand observation path and project it into the attached camera via an eyepiece. This image is transmitted into the camera at infinity projection where a normal camera would be focused at various distances.

Any camera used with a phototube must utilize a lens, either its own or the eyepiece of the phototube, to form an image. Cameras can be utilized to take pictures of microscopic specimens without phototubes; but, according to Mr. Gumpertz, such operations would be highly impractical because of the trial and error method required. Mr. Gumpertz testified (R. 41):

> Q. Could both the microscopes which you refer to as compound optical microscopes and stereo microscopes both, in fact, be considered to be compound microscopes rather than simple microscopes?—A. Yes. They are both compound microscopes. Only to make a distinction, one of them is referred to as a stereo microscope.

Markus F. Meyenhofer, a research biologist for Merck & Co. who, among other things, has used one of plaintiff's stereomicroscopes capable of photomicrography, testified that any kind of camera can

be utilized with a phototube as long as it would fit the diameter of the phototube. He stated that it is advisable to utilize a single lens reflex camera because you can check the focus, whereas on other cameras it would be focused by trial and error.

The witness also testified that in his own laboratory the phototubes on plaintiff's microscopes are not removed even if the microscopes are not going to be utilized in photomicrography for a long period of time. He stated that the phototube is not inconvenient during the normal use of the microscope. Mr. Meyenhofer testified (R. 136–137):

> Q. What factor determines the length of the phototube?—A. The factor is determined by the composition of the lenses in the microscope.
> Q. If the phototube were too long what would be the result?—A. Well, your image wouldn't be in focus.
> Q. And if it were too short?—A. The same thing would happen.

In addition to use with cameras, it was also brought out in the testimonial evidence that the imported phototubes are capable of being used in connection with microscopes for projection purposes and for motion-picture purposes.

In support of its primary claim under item 722.34 plaintiff argues "when the phototube is attached to a camera to be used for photomicrography, the tube is necessary to the completion of the camera and its operation." (plaintiff's brief, p. 14) Defendant counters with the argument that "the phototubes are not an integral, constituent, or component part without which the cameras with which the phototubes are used could not function as cameras. Therefore, the imported phototubes cannot possibly be considered to be 'parts' of cameras for tariff purposes." (defendant's brief, pp. 22–23)

And in support of its alternative claim under item 708.80 plaintiff argues that "[t]he phototube does not substantially affect the image created by the microscope for visual inspection, with the exception of some increase in size because of the length and path of the image, and some darkening of the image caused by the diversion of a portion of the light for photographic purposes." (plaintiff's brief, p. 15) Defendant, agreeing in the alternative, adds, "the imported phototubes are attached to microscopes, contribute to the magnification of microscopes, are designed to complement the optical system of microscopes, and function basically to permit a compound optical microscope without a means for photographing or projecting the image to serve in an equivalent manner (once a camera is also used) as a compound optical microscope with means provided for photographing or projecting the image." (defendant's brief, p. 34)

In the court's opinion, the imported phototubes are properly classifiable as mountings for compound optical microscopes under TSUS item 708.80, and the court so holds. It is established in the record that the stereomicroscopes to which the imported phototubes are attached are form of compound optical microscope. And it is also established in the record that it is the microscope and not the camera which is host to the imported phototubes. For example, the configuration of the phototubes is influenced by optical characteristics of the microscope, the tube can be and sometimes is left in place on the microscope when the scope is employed solely for examination purposes, and even in the case of cameras designed by the manufacturer of the tubes in issue for use with those tubes, the tubes comprise no part of the camera package. Hence, if the tube is part of any instrument comprising a photomicroscopy system within the broadened concept of the term "part" (see *Gallagher & Ascher Company* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964) [auxiliary heaters for automobiles]; *United States* (*Korlis Ltd., Party in Interest*) v. *The Westfield Manufacturing Company*, 49 CCPA 96, C.A.D. 803 (1962) [bicycle kickstands]; and *Trans Atlantic Company* v. *United States*, 48 CCPA 30, C.A.D. 758 (1960) [closer brackets for door frames] on optional equipment as parts of articles), it is part of the host microscope. Contrary to plaintiff's prime assertion, the tube is never "attached to a camera." In application the camera is mounted on or affixed to the tube or a portion thereof only after the tube has been mounted on the microscope. Consequently, in any sense of the meaning of the term "part," the tube cannot be deemed a part of a camera.

But even if it could reasonably be found that the imported phototubes are a "part" of a camera, the court would, nevertheless, be compelled, on the instant record, to find that the tube is a part for which Congress has otherwise made specific provision. There is no question in the court's mind but that these phototubes fall squarely within the ambit of the term "mountings" for compound optical microscopes under item 708.80. *Cf. United States* v. *International Forwarding Co.*, 9 Ct. Cust. Appls. 156, T.D. 37995 (1919), holding specially designed glass tubes for holding liquids for purposes of polariscopic examination to be "mountings" for optical instruments within the meaning of paragraph 93 of the Tariff Act of 1913. In that case the appellate court said (p. 159):

> * * * the word "mountings" when used in connection with optical instruments such as the microscope and polariscope is used in the sense of accessories. adjuncts, or parts thereof * * * .

Accord: See Explanatory Notes to the Brussels Nomenclature, 1955, section XVIII, heading 90.12.

And in view of the provision for mountings in item 708.80, resort to item 708.89 for classification of the phototubes in issue would be inappropriate since item 708.89 is at best residual.

For the reasons stated, plaintiff's alternative claim is sustained. Judgment will be entered herein accordingly.

Judgments of the United States Customs Court in Appealed Cases

September 12, 1978

Appeal 77–27.—E. R. Squibb & Sons, Inc. *v.* United States.—Broxodent Devices (Electric Toothbrushes)—Unfinished Toothbrushes—Electrical Articles and Parts—Machines and Parts—TSUS.—C.D. 4705 affirmed June 1, 1978. C.A.D. 1207.

Appeal 77–29.—D. H. Baldwin Co. et al. *v.* United States.—Electric Guitars—Constructed Value—Export Value.—C.D. 4704 affirmed June 1, 1978. C.A.D. 1208.

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